Supreme Court, U.S.
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No. 88-2130

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR O. D'ANGELO,

Petitioner,

vs.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 USC §1257(3).

II. WHETHER THE PROCEDURES EMPLOYED BY THE SUPREME COURT OF ILLINOIS IMPOSING DISCIPLINE ON PETITIONER FOR HIS VIOLATION OF LONG-ESTABLISHED ETHICAL PRINCIPLES VIOLATED THE DUE PROCESS REQUIREMENT OR EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

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CONSTITUTIONAL PROVISIONS INVOLVED

The ex post facto clause of the United States Constitution provides, "No State shall . . . pass any . . . ex post facto law." U.S. CONST. art I, §10.

The due process clause of the United States Constitution provides, "Nor shall any State deprive any person of life, liberty or property, without due process of law." U.S. CONST. amend. XIV.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. 28 U.S.C. § 1257.

RULES OF THE SUPREME COURT OF ILLINOIS AND ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION

Supreme Court Rule 753(c)(6). Inquiry, Hearing, and Review Boards. Except as otherwise expressly provided in these rules, the standard of proof in all hearings shall be clear and convincing evidence.

Supreme Court Rule 7-110(a). Relationship with Officials. (1980)

(a) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal, except that a lawyer may make a contribution to the campaign fund of a candidate for such office.

Supreme Court Rule 7-110(a). Relationship (Amended 1988)

"(a) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except those gifts or loan which a judge or a member of his family may receive under Rule 65(c)(4) of the Code Code of Judicial Conduct, except that a lawyer may make a contribution to the campaign fund of a candidate for such office."

Supreme Court Rule Canon 9. Avoiding Even the Appearance of Impropriety (1987).

Supreme Court Rule 65(c)(4). A Judge Should Regulate His Extrajudicial Activities To Minimize The Risk Of Conflict With His Judicial Duties.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an

invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor or loan from a relative; a wedding or engagement gift; loan from a lending institution in its regular course of business on the same terms generally available to persons who who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, including lawyers who practice or have practiced before the judge.

INTRODUCTION

For the sake of brevity, Respondent will not include sections in this brief for opinion below and jurisdiction. Respondent will address in Argument those portions of Petitioner's brief which Respondent considers inaccurate or inadequate.

STATEMENT OF THE CASE

On September 10, 1986, the Administrator of the Attorney Registration and Disciplinary Commission filed a fifteen count complaint against Petitioner pursuant to Illinois Supreme Court Rule 753. Petitioner was charged with giving things of value to judicial and political officials in violation of the Illinois Code of Professional Responsibility. On October 7, 1986, Petitioner's answer was filed. Subsequently, discovery ensued.

Hearing was conducted on January 28, 1987 and February 23, 1987. During the course of hearing, the Administrator moved to dismiss one count of the Complaint. Evidence was introduced to support each of the remaining counts.

On April 25, 1987, the reports of two members of the Hearing Board were

filed. Both members believed that Petitioner had engaged in professional misconduct. One member determined that disbarment was an appropriate sanction, the other recommended a private reprimand. On May 6, 1987, the report of the third member of the Hearing Board was filed. That member agreed that Petitioner had engaged in misconduct and recommended that he be suspended from the practice of law for one year.

On May 8, 1987, Petitioner filed exceptions to the Hearing Board report. Subsequently, the issues were briefed and argued before the Review Board.

On November 13, 1987, the report and recommendation of the Review Board was filed. The members of the Review Board unanimously determined that Petitioner's violations of the Code of Professional Responsibility were egregious and

recommended that he be suspended from the practice of law for two years.

On November 23, 1987, the Administrator filed a petition for leave to file exceptions with the Supreme Court of Illinois. The Administrator excepted to the recommendation of suspension and asked that Petitioner be disbarred. On November 24, 1987, Petitioner filed his exceptions to the report and recommendation of the Review Board. Petitioner excepted to both the findings and recommendation of the Review Board.

On February 3, 1988, the Court allowed the Administrator's petition for leave to file exceptions and the Petitioner's exceptions.

On December 15, 1988, after considering briefs and oral arguments, the Supreme Court of Illinois issued an order disbarring Petitioner from the practice of law.

On January 19, 1989, Petitioner filed a Petition for Rehearing with the Supreme Court of Illinois, raising a federal question for the first time. On January 30, 1989, the Supreme Court of Illinois denied the petition without ruling on the federal question. (Pet. App. 13a).

On February 1, 1989, Petitioner filed a Motion to Stay Mandate with the Supreme Court of Illinois so as to permit Petitioner time to seek review in the Supreme Court of the United States. On February 7, 1989, the Supreme Court of Illinois issued an order staying the mandate.

On February 15, 1989, Petitioner filed a Motion for Reconsideration with the Supreme Court of Illinois. On February 17, 1989, the Supreme Court of Illinois issued an order denying Petitioner's Motion for Reconsideration.

On June 29, 1989, Petitioner filed his Petition for Writ of Certiorari to the Illinois Supreme Court with the Clerk of the United States Supreme Court.

On July 5, 1989, Petitioner served Respondent with copies of his Petition for Writ of Certiorari filed with the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari to the Supreme Court of Illinois should be denied for the following reasons:

First, Petitioner failed to invoke federal jurisdiction pursuant to 28 U.S.C. § 1257(3). Petitioner did not raise any federal constitutional claim until filing a petition for rehearing before the Supreme Court of Illinois. Petitioner has not demonstrated that he fits within any exception as he had

reason to expect that the Court would decide the case as it did.

Second, in disciplining Petitioner, the Supreme Court of Illinois did not retroactively apply a new standard to Petitioner's acts of misconduct in violation of the ex post facto clause. Petitioner's conduct was violative of the former construction of Rule 7-110(a) of the Illinois Code of Professional Responsibility as well as the new construction.

Third, Petitioner was not denied due process of law during the course of the disciplinary proceedings against him. Petitioner received notice of the charge and an opportunity to defend, in complete compliance with the due process requirements as mandated in In re Ruffalo, 390 U.S. 544 (1968).

ARGUMENT

I. PETITIONER HAS FAILED TO INVOKE FEDERAL JURISDICTION PURSUANT TO 28 U.S.C. § 1257(3).

Petitioner is required to demonstrate in his petition that this Court has jurisdiction to review the judgment of the Supreme Court of Illinois. Petitioner has failed to do so.

Petitioner first raised his federal constitutional claims of a violation of the ex post facto clause and a denial of due process in a footnote in his petition for rehearing after the judgment of the Supreme Court of Illinois. (Pet. Br. 14 n. 14).

Raising a federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient to invoke federal jurisdiction unless the court actually

entertains the petition and expressly decides the question. Consolidated Turnpike Company v. Norfolk and Ocean View Railway Company, 228 U.S. 326, 334 (1913). As the Illinois Supreme Court denied the petition in the instant case without entertaining the federal question (Pet. App. B, 13a), the general rule precludes review by this Court. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and is accordingly denied. Consolidated Turnpike, 228 U.S. 326, 333-334 (1913).

In an attempt to invoke the jurisdiction of this Court to review a constitutional claim not timely presented to the Supreme Court of Illinois, Petitioner erroneously claims that his case fits within an exception to the

general rule. (Pet. Br. 13). In order to fit within the exception, petitioner must show that the Supreme Court of Illinois rendered an unexpected decision, giving him no prior opportunity to anticipate or assert his federal claim, and that the petition for rehearing constituted his first and only chance to present the matter to the state court. Herndon v. Georgia, 295 U.S. 441, 444 (1935); Brinkerhoff-Farris Trust Company v. Hill, 281 U.S. 673, 677-678 (1930); Missouri Insurance Company v. Gehner, 281 U.S. 313, 320 (1930).

Petitioner clearly does not fit within the exception. First, Illinois Supreme Court Rule 7-110(a), prior to being amended, prohibited the giving or lending of anything of value to a judge, official, or employee of a tribunal. Ill. Rev. Stat. ch. 110A, Art. VIII, Rule 7-110(a)(1980). Petitioner knew that

giving a thing of value to a judge or an official was wrong. Thus, Petitioner cannot now claim that the Illinois Supreme Court's decision was unexpected or a surprise. Second, Petitioner is bound to anticipate that prior decisions in similar cases will be applied to his case. Herndon v. Georgia, 295 U.S. 441, 446 (1935). Petitioner knew of the Illinois Supreme Court's decisions in In re Corboy, 124 Ill.2d 29, 528 N.E.2d 694 (1988) and In re Ketchum, 124 Ill.2d 50, 528 N.E.2d 689 (1988), on June 20, 1988. Yet, Petitioner did not amend his pleadings to bring a constitutional issue to the attention of the Illinois Supreme Court before it rendered its decision in Petitioner's case on December 15, 1988. Rather, Petitioner relegated his constitutional claim to a footnote in his petition for rehearing. Petitioner plainly failed to preserve a federal

question in the proceedings below and cannot now feign ignorance of the decisions in Corboy and Ketchum. Thus, Petitioner's contention that his petition for rehearing was his first opportunity to raise a federal question is without substance.

II. PROCEDURES EMPLOYED BY THE SUPREME COURT OF ILLINOIS IMPOSING DISCIPLINE ON PETITIONER FOR HIS REPEATED VIOLATIONS OF LONG ESTABLISHED ETHICAL PRINCIPLES DID NOT VIOLATE THE EX POST FACTO CLAUSE OR THE DUE PROCESS REQUIREMENT OF THE UNITED STATES CONSTITUTION.

The state courts have the inherent authority to regulate attorney discipline. See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). The Illinois Supreme Court has the exclusive power to discipline attorneys who have been admitted to practice before it. People ex. rel. Brazen v. Finley, 119 Ill.2d 485, 519 N.E.2d 898 (1988); In re Mitan, 75 Ill.2d 118, 387 N.E.2d 278

(1979), cert. denied, 444 U.S. 916 (1979).

Petitioner incorrectly contends that the Illinois Supreme Court violated the ex post facto clause of the United States Constitution by retroactively applying a new standard to his conduct. Petitioner, however, fails to understand that the Illinois Supreme Court did not apply a new standard to his conduct.

Petitioner was disbarred from the practice of law for paying for more than $10,000.00 worth of car rental charges on behalf of numerous Circuit Court of Cook County judges and public officials of the City of Chicago. The Illinois Supreme Court concluded that Petitioner violated Rule 7-110(a) of the Illinois Code of Professional Responsibility, as amended in In re Corboy, et. al., 124 Ill.2d 29, 528 N.E.2d 694 (1988). Prior to Corboy, Illinois lawyers were strictly prohibited

from giving anything of value to judges except for campaign contributions to designated judicial campaign committees. Id. at 37, 528 N.E.2d at 697. In Corboy, the Illinois Supreme Court amended Rule 7-110(a) to comport with Rule 65 of the Code of Judicial Conduct. Id. As amended, Rule 7-110(a) permits gifts and loans to judges from lawyers if the Code of Judicial Conduct permits the judges to accept the gift or loan. Id. at 44, 528 N.E.2d at 701.

The Illinois Supreme Court further concluded that Petitioner engaged in conduct in which he failed to avoid the appearance of professional impropriety. The Illinois Supreme Court found Petitioner's practice of acting as a "travel agent" for decisionmakers an intolerable practice. The Court concluded that Petitioner's contrived activities gave the impression that he

could purchase favors from judges and officials. His blatant influence peddling was so egregious as to warrant disbarment.

This court has long held that the ex post facto clause of the United States Constitution applies only to laws prohibiting criminal conduct. Bankers Trust Company v. Blodgett, 260 U.S. 647 (1923). A disciplinary proceeding is not criminal in nature. In re Daley, 549 F.2d 469 (7th Cir. 1977), cert. denied, 434U.S. 829 (1977). Cf., In re Ruffalo, 390 U.S. 544 (1968). (Disciplinary proceedings described as quasi-criminal in nature).

Even if the ex post facto clause applies to disciplinary proceedings, it does not apply to the case at bar. The cases that Petitioner cites in support of his claim that the decision of the Illinois Supreme should be barred by the

ex post facto clause as applied through the Due Process Clause are easily distinguished from Petitioner's case. First, in Sexton v. Supreme Court Committee on Professional Conduct, 295 Ark. 141, 747 S.W.2d 94 (1988), an attorney was charged with a violation of the Model Rules of Professional Conduct that had not been adopted at the time of his misconduct. There, the court held that the attorney could not be charged with a violation of a rule that did not even exist at the time of his misconduct. Sexton, 747 S.W.2d at 96 (1988). Second, in In re Inquiry Concerning A Judge, No. 77-16, 357 So.2d 172 (1978), a judge engaged in conduct unbecoming a member of the judiciary prior to the amendment of the rule which prohibited the misconduct. The judge was charged with a violation of the amended rule only. Id., 357 So.2d at 174. Thus, in the cases advanced by

Petitioner, the Respondent's were charged with violations of rules that did not exist at the time of their misconduct.

In the instant case, the rule prohibiting Petitioner's activity existed at the time of his misconduct. Unlike the Sexton and In re Inquiry cases, Petitioner's activity in this case was wrong under Rule 7-110(a) prior to its amendment and wrong under 7-110(a), as amended. This Court has held that in order for the ex post facto clause to apply to a law, the law must be more burdensome than the prior law. Dobbert v. Florida, 432 U.S. 282, 294 (1977). Under any analysis of former or amended Rule 7-110(a), Petitioner's loans were improper.

Petitioner next erroneously argues that the Supreme Court of Illinois violated the Due Process Clause of the United States Constitution. Again,

Petitioner's argument fails. In In re Ruffalo, 390 U.S. 544 (1967), this Court stated that an attorney in a disciplinary proceeding is entitled to due process to the extent that he receives notice of the charge and an opportunity to be heard. Id. at 550. Both requirements have been met. Respondent had notice that he was charged with making and soliciting proscribed loans to a judge. He was afforded ample opportunity to defend the charges and he did so in a vigorous manner.

In support of his due process argument, Petitioner relies on this Court's holding in Bouie v. Columbia, 378 U.S. 347 (1964). Bouie, however, is readily distinguishable. In Bouie, it was found that due process was violated because a state's interpretation of a criminal statute punished conduct which was not criminal at the time the act was

committed. Therefore, the defendants lacked fair warning that their conduct was prohibited. In the case at bar, Petitioner knew the Administrator had charged him with numerous violations of Rule 7-110(a). That rule existed in Illinois as a rule of court since 1980. Petitioner knew that his many loans to judges were considered prohibited. He cannot now argue lack of notice.

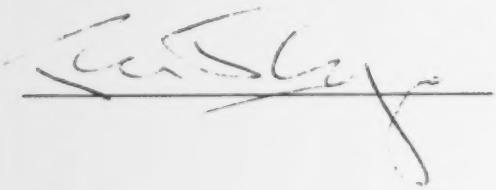
In summary, the Petitioner failed to preserve a federal question below. His arguments constitute transparent attempts to invoke the jurisdiction of this Court. The procedure employed by the Illinois Supreme Court did not violate the ex post facto provision of the United States Constitution or the Due Process Clause. Petitioner's actions were prohibited under the disciplinary rules at the time of his misconduct. This Court should not allow Petitioner's purported ignorance of

his ethical responsibility delay the disciplinary process in the Illinois Supreme Court.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits the Petition for Writ of Certiorari be denied.

Respectfully submitted,



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